



# State of New Jersey

DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES  
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VALERIE HARR  
*Director*

## STATE OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

K.V.,	:	
	:	
PETITIONER,	:	ADMINISTRATIVE ACTION
	:	
v.	:	FINAL AGENCY DECISION
	:	
DIVISION OF MEDICAL ASSISTANCE	:	OAL DKT. NO. HMA 2005-2014
	:	
& HEALTH SERVICES &	:	
	:	
CAPE MAY COUNTY BOARD OF	:	
	:	
SOCIAL SERVICES,	:	
	:	
RESPONDENTS.	:	

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the OAL case file and the documents filed below. Respondent filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision in this matter is October 29, 2015, in accordance with an Order of Extension.

Petitioner was found eligible for Medicaid benefits as of November 1, 2011.<sup>1</sup> However, she was found to have transferred assets that resulted in a penalty. At issue is \$93,577.79 in an account she owned in South Carolina that held funds from the sale of real estate. She had lived there before moving to New Jersey to live with her grandson. ID at 2. Her grandson holds Power of Attorney (POA) authority for Petitioner. She entered a nursing home in July 2011 and died in October 2012. The funds in question were withdrawn on May 26, 2011 in a check payable to Petitioner's daughter in South Carolina. Her daughter then gave one-half of the funds to Petitioner's other daughter who lives in New Jersey. The daughters contend that Petitioner instructed them to take the funds and share them. (P-1 at 4 ¶ 7).

Petitioner, or rather her estate, contends she was entitled to a waiver of the transfer penalty due to fulfillment of the requirements for an undue hardship. To that end, the Initial Decision concluded that Petitioner was not subject to a transfer penalty due to the funds being inaccessible. For the reasons that follow, I hereby REVERSE the Initial Decision.

First and foremost, until the transfer to her daughters, Petitioner's assets were always available to her either through her own actions or by and through her grandson and POA. That POA document was in effect from 2003. R-1 at 47. During the time in question there was someone authorized to act on her behalf and access her funds.

Citing I.L. v. DMAHS, 389 N.J. Super. 354 (2006), the Initial Decision found that "like I.L., petitioner's assets in the amount of \$93,577.79 were stolen." However, I.L.'s Medicaid application was denied due to excess resources. That case addressed the

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<sup>1</sup> Petitioner's prior Medicaid application had been denied due to failure to document resources. That matter was the subject of a fair hearing under docket number HMA 13328-2011 and was withdrawn in March 2014.

limited issue of whether a life insurance policy should count as an excludable resource under N.J.A.C. 10:71-4.4(b)(6) in determining the applicant's initial eligibility for Medicaid benefits. Here, Petitioner was not denied benefits for having excess resources. In simple terms, Petitioner did not have any resources at the time of her Medicaid application, thus whether the \$93,577.79 is considered a "countable resource" affecting Medicaid eligibility is irrelevant. See R.P. v. DMAHS and Bergen County Board of Social Services, A-06148-11, slip op. at 6, (App. Div. Oct. 22, 2013) (wherein the court rejected the argument "that DMAHS erred in denying Medicaid benefits and imposing a penalty period for resources that were inaccessible and unavailable to" the applicant). As such, I REVERSE the Initial Decision's conclusion that the funds were unavailable to Petitioner pursuant to N.J.A.C. 10:71-4.1.

Rather the issue here is whether Petitioner was entitled to a waiver of the penalty stemming from the transfer of South Carolina account. A resource cannot be transferred or disposed of for less than fair market value during or after the start of the five-year look-back period before the individual becomes institutionalized or applies for Medicaid as an institutionalized individual. 42 U.S.C.A. 1396p(c)(1); N.J.A.C. 10:71-4.10(a). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.



However, N.J.A.C. 10:71-4.10q(1) provides that undue hardship exists when:

- i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; **and**
- ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

(Emphasis added).

Both prongs must be satisfied in order for a waiver of the penalty. See R.P. v. DMAHS and Bergen County Board of Social Services, supra. (Finding that both prongs of the regulation must be met to grant a hardship waiver). Interestingly, the Initial Decision does not even cite subsection (i) and only makes findings regarding subsection (ii). Subsection (i) requires Petitioner demonstrate her life is endangered by the transfer penalty. Without evidence that Petitioner's health and life is in danger as a result of the transfer penalty, or evidence that she is being deprived of food, clothing, shelter, or other necessities of life, I can reach no other conclusion other than to find Petitioner did not meet the first prong of the waiver test. N.J.A.C. 10:71-4.10(q)(1)(i).

Petitioner readily admits she did not pursue civil litigation to recover the assets as required by the second prong. Indeed, the ALJ specifically found that "she did not exhaust all of the remedies available to her in law or equity." ID at 7. Based on that finding, Petitioner has not met the burden for the second prong of the hardship regulation.

Rather the Initial Decision fashions a remedy that does not appear in the regulations that permits Petitioner to avail herself of N.J.A.C. 10:71-4.10q(1)(i) without actually fulfilling either of the prongs.<sup>2</sup> The Initial Decision concluded she undeniably failed to comply with the requirements for a hardship waiver which warrants denial of the hardship waiver. Thus, I hereby REVERSE the Initial Decision's inherently contrary conclusion that Petitioner met the burden for a hardship waiver and ORDER that the penalty stand.

THEREFORE, it is on this <sup>27<sup>th</sup></sup> day of OCTOBER 2015

ORDERED:

That the Initial Decision is hereby REVERSED.



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Valerie Harr, Director  
Division of Medical Assistance  
and Health Services

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<sup>2</sup> The Initial Decision also states, without legal citation or authority, that the Medicaid agency is responsible to litigate the breach of fiduciary duty on behalf of Petitioner's estate. Rather it is Petitioner's burden to comply with the hardship waiver and to demonstrate that she has met the requirements. N.J.A.C. 10:71-4.10q